SUBRAMANIAM PARAMASIVAM & ORS

v.

MALAYSIAN AIRLINE SYSTEM BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[ORIGINATING SUMMONS NO: D5-24-355-1995]
7 NOVEMBER 2001

CIVIL PROCEDURE: *Damages - Assessment of damages - Whether proper - Whether damages arose from a breach of contract - Whether plaintiffs could claim for non-pecuniary losses in contract - Remoteness of damages - Assessment of damages based on tort - Measure of damages - Whether a case for nominal damages*

The plaintiffs were passengers of Malaysian Air System Flight ('the defendant') from Madras, India to Kuala Lumpur, Malaysia. They paid for an excess baggage of 20 kilograms imposed by the defendant at the Madras Airport. At the Subang International Airport Kuala Lumpur, they paid an additional RM618 for an excess baggage of 60 kilograms. The plaintiffs sought a declaration that the defendant had no right to charge the plaintiffs for the excess baggage payment of RM618 at the Subang International Airport and that the imposition of such a charge was void and illegal. They also sought an order that the sum of RM618 be returned to them and for damages for physical inconvenience, mental distress, agony, humiliation, loss of reputation and injured feeling. The trial judge ordered that damages be assessed before the registrar. At the hearing before the registrar, it was submitted, *inter alia,* that the plaintiffs were held up for some two hours, the defendants' employees were rude and that the plaintiffs had been embarrassed when the defendant's employees directed them to have their baggage re-weighed in the presence of other passengers. Further, the 1st plaintiff, a practising lawyer and head of the youth wing of the Malaysian Indian Congress was put in low esteem by the act of the defendant as he had to resort to borrowing some money from his supporters who were waiting to welcome him at the airport as he did not have enough money with him. The registrar found that the plaintiffs had indeed suffered physical inconvenience, mental distress, agony and humiliation for having been kept 'virtually captive' at the airport for nearly two hours during the ordeal and awarded general damages of RM75,000, RM12,000 and RM15,000 respectively. The issue herein was whether the registrar's assessment of damages was proper in the circumstances.

Held:

[1] Contracts are concerned with commercial matters and the obligations of parties involve mainly the fulfilment and enforcement of bargains. Non-pecuniary losses such as frustration, injured feeling, mental distress and loss of reputation suffered by a party as a result of a breach are not generally regarded as matters that arose in the natural course of event or were within the contemplation of the contracting parties when they entered into the contract. They are therefore considered remote and generally irrecoverable unless the contract is of the kind that affects his personal interests. (p 238 c-d)

[2] The contract that the parties entered into in this case (a contract of carriage to convey the plaintiffs from India to Malaysia) was clearly of a nature that affected the personal, social and family interests of the plaintiffs. It therefore belonged to a class in which non-pecuniary loss may be awarded for any breach being committed by the defendant. Whether or not the plaintiffs may make such claims rests purely on the question of remoteness under the rule in *Hadley v. Baxendale*. The question was whether the non-pecuniary loss suffered by the plaintiffs arose naturally from the breach, or whether such loss were within the contemplation of the parties when they entered into the contract of carriage. (p 239 a-c)

[3] It would be quite legitimate to assume that if the defendant chose to re-weigh the plaintiffs' baggage at the Subang International Airport in breach of its contract with the plaintiffs, the plaintiffs would not in the natural course of things suffered aggravated pecuniary loss such as mental distress, agony, humiliation, loss of reputation and injured feeling. Nor would such losses be reasonably be expected to be within the contemplation of the plaintiffs and the defendant when they entered into the contract. Those were clearly matters which, under s. 74(1) and (2) of the Contracts Act 1950, would be considered too remote and therefore irrecoverable. The loss the plaintiffs would be expected to suffer would be limited only to some inconvenience and discomfort which would not allow them to make any claim. (p 239 e-g)

[4] The court does not deal with trivialities, *ie, de minimis non curat lex.* It is not uncommon for a contracting party to encounter some difficulty in the performance of his obligation. Where eventually that obligation is performed, some allowance exempt from liability within the permissible limit of give and take can be made for minor imperfections. (p 240 a-b)

[5] The judgment against the defendant was entered clearly on the ground that the defendant did not have the right to have the plaintiffs' baggage re-weighed at the final destination and to impose on them the further excess baggage charges. The infringement of the plaintiffs' right not to be forced into paying the excess baggage gave rise to an action in tort. Rightly therefore the assessment of damages should have been based on liability in tort and not breach of contract. There could not be any breach of contract on the part of the defendant as its obligation under the contract had been duly performed upon conveying the plaintiffs to the Subang International Airport. (pp 243 g-i & 244 a-e)

[6] A tort arising from the infringement of a legal right is actionable *per se*, *ie*, damage is presumed merely upon proof of the infringement of such a right. There is no need for the plaintiff to prove a causal connection between the wrong done and the damage suffered in consequence, such that the question of remoteness is quite irrelevant. (p 244 f)

[7] There are two basic principles of assessment of damages: (1) that damages is that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation; and (2) the plaintiff should not be allowed to profit by it. If the two principles were properly appreciated, it would be at once discernible that the registrar had awarded too much for too little. The award in multiples of thousands was outrageously excessive and disproportionate. The amount awarded to each plaintiff exceeded many times the cost of air passage that he might have paid. (pp 244 i & 245 a-e)

[8] The claimant must prove his loss. 'Prove' means to provide some form of evidence sufficient to convince the decider to the point that he believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, act on the supposition that it exists. The plaintiffs provided none of the evidence that they claimed to have suffered beyond the mere assertion of having suffered them. (p 245 f-i)

[9] An award of nominal damages under the circumstances was inappropriate. The plaintiffs did suffer some discomfort and inconvenience, *albeit* for a short duration of only two hours. As trivial and small as they might appear, nevertheless the plaintiffs were entitled to have them assessed. Had their egress from the airport been without let or hindrance, they would have arrived home some two hours earlier, in time to start a new day with a clear mind and purpose. In all fairness therefore, they should be compensated for the discomfort and inconvenience they had undergone. That should translate in monetary form to the cost of providing each of them with a day's rest, *ie*, in the sum of RM300. (p 247 c-f)

[Defendant to pay each plaintiff the sum of RM300.]

Case(s) referred to:
Ashby v. White [1703] 2 Lord Ryam 938 ***(refd)***
Bohham-Carter v. Hyde Park Hotel Ltd 64 TLR 177 ***(refd)***
Burton v. Puseketon [1876] LR 2 Ev 3440 ***(refd)***
C & P Haulage v. Middleron [1983] 3 All ER 94 ***(refd)***
Flint v. Lowell [1935] 1 KB 345 ***(refd)***
Fraser & Neave Ltd v. Yeo Hiap Seng Ltd [1989] 1 CLJ 275; [1989] 2 CLJ (Rep) 809 ***(refd)***
Hadley v. Baxendale [1854] 9 Ex 341 ***(refd)***
Haron Mundir v. SAAA [1992] 1 SLR 18 ***(refd)***
Hobbs v. London and South Western Railway Co [1875] LR QB 111 ***(refd)***
Jarvis v. Swans Tours Ltd [1973] QB 233 ***(dist)***
John v. Dharmaratnam [1962] MLJ 187 ***(refd)***
Kitchen v. Royal Air Forces Association [1958] 2 All ER 241 ***(foll)***
Livingstone v. Rawyard Coal Co [1880] 5 App Cas 25 ***(refd)***
Malaysian Rubber Development Corp Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 ***(refd)***
Nicholls v. Elley Beet, etc Ltd [1936] Ch 343 ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 ***(refd)***
Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 ***(refd)***
The Mediana [1900] AC 113 ***(refd)***
Watts v. Morrow [1991] 1 WLR 142 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74(1), (2)
Evidence Act 1950, s. 2

Other source(s) referred to:
Chitty, *Contracts*, 28th edn, para 20-040
Clerk & Lindsell, *Tort*, 18th edn, para 1-22
McGregor, *Damages*, 1997 edn, paras 92, 99

For the plaintiff - Subramaniam Paramasivam; M/s Subra & Partners
For the defendant - Shaiful Omar Ahmad; M/s Aziz Zakaria Shaiful & Wan

Reported by Usha Thiagarajah

JUDGMENT

Kang Hwee Gee J:
The plaintiffs were passengers of Malaysian Air System Flight MH 181 from Madras to Kuala Lumpur on 1 June 1995. They had checked in with their baggage at Madras airport at about 9pm on that day and had an excess baggage of 20 kilogrammes. They paid the excess baggage payment of Rs. 4080 (RM325) imposed by the defendant.

Upon landing at Subang International Airport, Kuala Lumpur, the plaintiffs were stopped by an officer of the airline who insisted that their baggage be re-weighed. They were at the time proceeding to customs with their baggage on trolleys. They were directed to a baggage counter where the defendant's employees went through another process of re-weighing their baggage. Their baggage was found to be 60 kilogrammes in excess instead of only 20 kilogrammes as determined at Madras Airport. They insisted that the plaintiffs pay an additional RM618 failing which their baggage would not be released to them.

They protested but to no avail. The ordeal lasted some two hours from 5.40am to 7.40am when in the end the plaintiffs managed somehow to settle the sums with the defendant.

The plaintiffs sought by this originating summons, a declaration that the defendant had no right to charge the plaintiffs an excess baggage payment of RM618 at the Subang International Airport on 2 June 1995 and that the imposition of such a charge on the plaintiffs was void and illegal.

They also seek an order that the said sum of RM618 be returned to them and that damages suffered by the plaintiffs be assessed by the senior assistant registrar.

Kamalanathan Retnam JC (as he then was) before whom the originating summons was heard gave judgment for the plaintiff. He ordered damages to be assessed before the registrar.

At the hearing before the registrar it was submitted that the plaintiffs were held up for some two hours from 5.40am until 7.40am. They were unable to collect their baggage unless they settled the sum the defendant demanded. For most of the time they were kept standing at the baggage counter. The defendant's employees were rude. At the time when the defendant's employees directed them to the baggage counter to have their baggage re-weighed other passengers were present. The plaintiffs were embarrassed.

Both the parties submitted the affidavits of their witnesses to the registrar. The witnesses were also cross-examined in person before him.

The first plaintiff was a practising lawyer. He was the head of the youth wing of the Malaysian Indian Congress and was also its Chief of Information for the State of Perak. He also held the chairmanship of two private registered companies. At the time he arrived at Subang Airport his friends and supporters were waiting to welcome him. He did not have enough money to pay to the defendant as he had already spent all of it on his relatives in India He had to resort to borrow the sum from his friends in consequence of which they had

put him in low esteem. By reason of the act of the defendant he said he suffered physical inconvenience, mental distress, agony, humiliation, loss of reputation and injured feeling.

The second plaintiff was the wife of the first plaintiff. She went through the same experience and claimed to have suffered the same loss as the first plaintiff as a result. She also claimed to have suffered flight phobia as she came to realise later that the plane had been flying with excess weight and had therefore compromised on safety. She consulted her doctor a Dr. Raja Ram who gave evidence supporting her complaint. He treated her for weakness and fatigue, but not for any psychological condition.

The third plaintiff was a housewife and a part-time tour operator undertaking tours for groups to India. She also claimed to have suffered the same loss as the first plaintiff. She was disturbed by the incident that she could not continue her part-time tour business and had to be brought by a friend to see a priest in India. In addition she also claimed a loss of income as a result of not being able to continue with her business.

The defendant's two employees who undertook the re-weighing of the baggage denied that they had treated the plaintiffs harshly although they did not deny that the plaintiffs were kept at the airport for some two hours.

At the hearing before the registrar, counsel for the plaintiffs submitted that the 1st, 2nd and 3rd plaintiffs had suffered non-pecuniary loss on account of the fact that they had undergone physical inconvenience, mental distress, agony and humiliation. It was also submitted that the 1st plaintiff who was a politician with a large following and his wife (the 2nd plaintiff) had also suffered the loss of reputation and injured feeling. Additionally, she had also suffered from flight phobia.

The registrar found that the plaintiffs had indeed suffered physical inconvenience, mental distress, agony and humiliation for having been kept 'virtually captive' at the airport.

Additionally, he found the 1st plaintiff by reason of his position as a practising lawyer, businessman and politician, had also suffered loss of reputation. He relied on *Chitty on Contracts* 28th edn. para. 20-040 which states that such non-pecuniary loss can be claimed, "where the breach of contract causes the plaintiff physical inconvenience or discomfort – *Burton v. Puseketon* [1876] LR 2 Ev. 3440."

With respect to the damages under the head 'disappointment and mental distress', he relied on the English Court of Appeal case of *Jarvis v. Swans Tours Ltd* [1973] QB 233. He found that the plaintiffs in the instant case had suffered physical inconvenience having to wait at the airport for two hours. They were able to leave only after they settled the extra excess baggage charge of RM618 without being provided with any form of comfort in the meantime.

Consequently, the registrar awarded general damages on a global basis to the plaintiffs encompassing the elements described as follows:

(i) to the 1st plaintiff the sum of RM75,000, for physical inconvenience, mental distress, agony, humiliation, and loss of reputation;

(ii) to the 2nd plaintiff the sum of RM12,000, for physical inconvenience, mental distress, agony and humiliation, and

(iii) to the 3rd plaintiff the sum of RM15,000, for physical inconvenience, mental distress, agony and humiliation.

Contract Or Tort – Remoteness Of Damages

The judgment of Kamalanathan Ratnam JC itself did not appear to have ruled whether the defendant was in breach of contract. But the registrar had proceeded to assess damages on the basis that the defendant had committed a breach of contract, a fact to which both parties have resigned themselves to accept – this notwithstanding that the defendant could not have been liable on a breach of contract – for its contractual obligation had been performed and discharged without a breach by the time the plaintiffs landed with their baggage at Subang International Airport.

Any assessment of damage must necessarily begin with the first principle – a consideration of remoteness of damage with respect to the loss that the successful plaintiff is claiming. But whether the damages to be assessed arose from a breach of contract or from a tort is crucial – for an assessment of damages involves the fundamental consideration of remoteness of damage the principle of which is different in contract and tort, an issue which I shall address later in this judgment.

As Edgar Joseph Jr J said in *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 and followed in the Supreme Court case of *Malaysian Rubber Development Corp Bhd v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783:

A word now about general principles. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable. The principle of remoteness of damage is a limiting principle of policy and the principles applicable in contract and tort are not the same (see *Koufos v. Czarnikow Ltd (The Heron II)* [1969] 1 AC 350.

Assuming The Damages Arose From A Breach Of Contract

Remoteness of damage in contract is governed by s. 74 sub-ss. (1) and (2) of the Contracts Act 1950 which reads as follows:

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

The purport of the section it would appear, was derived from the celebrated speech of *Alderson B. in Hadley v. Baxendale* [1854] 9 Ex. 341 at 354-355:

We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably be considered either arising naturally, ie, according to the natural course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Whether Plaintiffs Can Claim Non-Pecuniary Loss In Contract

The defendant's appeal appears to have been anchored principally on the submission that non-pecuniary loss should not be awarded to the plaintiffs in this case on the general principle that non-pecuniary loss cannot be awarded in contract. She relied on a passage in the Singapore High Court case of *Haron bin Mundir v. SAAA* [1992] 1 SLR 18, at 30H, per Selvam JC:

The plaintiff also claims general damages for emotional damage, mental anguish, humiliation and reputation. These are unquestionably recognized heads of damage in the regime of tort. In the realm of contract general damages for physical injury may be awarded in cases of breach of contract for sale of goods: see *Wren v. Holt* where injury was caused by beer containing arsenic; *Godley v. Perry* where injury was caused by a defective catapult. As a result

> of *Donoghue v. Stevenson* the same facts would now also give rise to either concurrent or alternative liability in tort. However, as a general rule damages for frustration, injured feeling, mental distress, humiliation and loss of reputation will not as a rule be awarded for breach of contract: *Bliss v. South East Thames Regional Health Authority*. In *Addis v. Gramaphone Co Ltd* the House of Lords regarded the general rule as too invertebrate to be altered even if it were desirable.

Selvam JC was speaking of the general rule. One must appreciate that contracts are concerned with commercial matters and that the obligations of the parties involve mainly the fulfillment and enforcement of bargains. Such non-pecuniary loss as frustration, injured feeling, mental distress, loss of reputation and injured feelings suffered by a party as a result of a breach are therefore not generally regarded as matters that arose in the natural course of event or were within the contemplation of the contracting parties when they entered into the contract. They are therefore considered remote and generally irrecoverable unless the contract is of the kind that affects his personal interests. *McGregor on Damages* 1997 edn explains the law in paras. 92 and 99 of his work:

> Contract is primarily concerned with commercial matters and therefore the protection afforded by the law of contract is primarily directed to commercial losses. Indeed it has been said that "in an action founded on breach of contract the only kind of loss ... which is a subject of compensation is a financial loss." (*Sunley v. Cunard White Star* [1939] 2 KB 791 at 799, per Hallett J). But this today too sweeping a statement, as will appear as the various possible heads of non-pecuniary loss are considered.
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> If however, the contract is not primarily a commercial one, in the sense that it affects not the plaintiff's business interest, but his personal, social and family interests, the door should not be closed to awarding damages for mental suffering **(or any other non-pecuniary loss)** if the court thinks that in the particular circumstances the parties to the contract had such damage in their contemplation. (emphasis added)

Bingham LJ summed up the point in the later Court of Appeal case of *Watts v. Morrow* [1991] 1 WLR 142, in this way:

> A contract breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not I think, founded on the assumption that such reactions are not foreseeable, which they surely are or maybe, but on consideration of policy. But the rule is not absolute. Where the very object of a contract, pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided of if the contrary result is procured instead.

But the contract that the parties entered into in this case (a contract of carriage to convey the plaintiffs from India to Malaysia) was clearly of a nature that affected the personal, social and family interest of the plaintiffs. It therefore belongs to that class in which non-pecuniary loss may be awarded for any breach being committed by the defendant. Whether or not the plaintiffs may make such claims rests purely on the question of remoteness under the rule in *Hadley Baxandale, supra* – an issue which I shall address shortly.

Whether The Claim Is Too Remote

The question that must now be asked is whether the non-pecuniary loss suffered by the plaintiffs arose naturally from the breach, or whether such loss were within the contemplation of the parties when they entered into the contract of carriage. More precisely, one should ask the question whether by having their baggage re-weighed at Subang International Airport at Kuala Lumpur, the plaintiffs would in the natural course of things have suffered the non-pecuniary loss they are now claiming or whether such loss were within their contemplation.

It would be quite legitimate to assume that if the defendant chose to re-weigh the plaintiffs' baggage at Subang Airport in breach of its contract with the plaintiffs, the plaintiffs would not in the natural course of things have suffered such aggravated pecuniary loss as mental distress, agony, humiliation, loss of reputation and injured feeling. Nor would such losses be reasonably expected to be within the contemplation of the plaintiffs and defendant when they entered into the contract. These are clearly matters which under s. 74(1) and (2) of the Contracts Act 1950, *supra*, would be considered too remote and therefore unrecoverable.

But that is not to say that in the natural course of things, the plaintiffs would not be expected to suffer any loss under the circumstances. They would. The loss, however, would be limited only to some inconvenience and discomfort that would not have allowed them to make any claim – for they would not have been substantial enough to be recoverable. As Mellor J said in the *Hobbs v. London and South Western Railway Company, infra,* at p. 122:

> I quite agree with my brother Parry, that for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental, and a case where the word inconvenience, as I here use, would apply. But I must say, if it is a fact that you arrived at a place where you did not intend to go to, where you are placed by reason of the breach of the contract of the carriers at a considerable distance from your destination the case may be otherwise.

There is a strong rationale to support what Mellor J said. It has to do with the maxim, *de minimis non curat lex* – the court does not deal in trivialities. It is not uncommon for a contracting party to encounter some difficulty in the performance of his obligation. Where eventually that obligation is performed, surely some allowance exempt from liability within the permissible limit of give and take can be made for minor imperfections?

The Court of Appeal case of *Jarvis v. Swans Tours* [1973] QB 233 relied upon by counsel for the plaintiffs and accepted by the registrar as authority that such non-pecuniary damage may be awarded, can be distinguished on the facts.

In that case the plaintiff had booked a winter sports holiday to Switzerland on the strength of the defendant tour company's lavishly illustrated travel brochure, only to discover that the great time promised did not materialise. Many facilities that the defendant promised would be provided did not exist as a result of which the plaintiff suffered disappointment, distress annoyance and frustration. The ratio for allowing the plaintiff's claim appears in the following passage of the speech of Edmund Davis LJ at p. 239 of the judgment:

> If in such circumstances travel agents fail to provide a holiday of the contracted quality, they are liable in damages. In assessing those damages the court is not, in my judgment, restricted by the 63.45 pound paid by the client for his holiday. Nor is it confined to matters of physical inconvenience and discomfort, or even to quantifying the difference between such items as he expected delicious Swiss cakes and the depressingly desiccated biscuits and crisps provided for tea, between the ski-pack ordered and the miniature skis supplied, nor between the "very good ... house party arrangements" assured and the lone wolf second week of the unfortunate plaintiff's stay. The court is entitled, and indeed bound, to contrast the overall quality of the holiday so enticingly promised with that which the defendants in fact provided.
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> In determining what would be proper compensation for the defendants' marked failure to fulfil their undertaking I am of the opinion that, again to use Mellor J's terms (LR 10 QB 111, 122), "vexation" and "being disappointed in a particular thing you have set your mind upon" are relevant considerations which afford the court a guide in arriving at a proper figure.
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> When a man has paid for and properly expects an invigorating and amusing holiday and, through no fault of his, returns home dejected because his expectations have been largely unfulfilled, in my judgment it would be quite wrong to say that his disappointment must find no reflection in the damages to be awarded. And it is right to add that, in the course of his helpful submissions, Mr. Thompson did not go so far as to submit anything of the kind. Judge Alun Pugh took that view in *Feldman v. Allways Travel Service* [1957] CLY 934. That, too, was a holiday case. The highly experienced senior

county court judge there held that the correct measure of damages was the difference between the price paid and the value of the holiday in fact furnished, "taking into account the plaintiff's feelings of annoyance and frustration."

The trial judge clearly failed to approach his task in this way, which in my judgment is the proper way to be adopted in the present case. He said:

> There is no evidence of inconvenience or discomfort, other than that arising out of the breach of contract and covered by my award. There was no evidence of physical discomfort, eg, bedroom not up to standard.

His failure is manifested, not only by these words, but also by the extremely small damages he awarded, calculated, be it noted, as one half of the cost of the holiday. Instead of "a great time," the plaintiff's reasonable and proper hopes were largely and lamentably unfulfilled. To arrive at a proper compensation for the defendants' failure is no easy matter. But in my judgment we should not be compensating the plaintiff excessively were we to award him the 125 pound damages proposed by Lord Denrnng MR. I therefore concur in allowing this appeal.

The passage in the judgment indicates clearly that the damages suffered by Jarvis arose directly from the failure of the defendant's tour company to provide the "invigorating and amusing" holiday that it had promised the plaintiff.

That the damages had arisen in the nature of things in the *Jarvis*'s case was too obvious that the Court of Appeal did not find it necessary to consider whether the plaintiff's claim for disappointment, distress, annoyance and frustration come within the principle of remoteness of damage. The defendant's liability was taken for granted and damages under the respective heads were awarded as a matter of course.

Unlike the *Jarvis*'s case however, the defendant's breach in the instant case was not its failure to convey the plaintiffs and their baggage from Madras to Kuala Lumpur, but its act in re-weighing the plaintiffs' luggage and unlawfully imposing the excess baggage charge upon the plaintiffs and in the process caused the plaintiffs to suffer the non-pecuniary loss which they are now claiming – clearly a happening which did not arise from the natural course of things nor within the contemplation of the parties, and was therefore irrecoverable.

The Court of Appeal case of *Hobbs v. London and South Western Railway Co.* [1875] LR QB 111 serves to illustrate the limit placed by the court in respect of claims for non-pecuniary loss incurred by a breach of contract by a carrier, based on the principle of remoteness of damage.

In that case the London and South Western Railway Co. in breach of its contract of carriage failed to convey the plaintiff and his family to their intended destination. They were left stranded in the middle of the night. They had to walk some five miles to reach their house, in consequence of which the plaintiff's wife suffered cold and was unable to assist her husband in his business as before and medical expenses were incurred. It was held that the plaintiff was entitled to the eight pounds sterling damages awarded for the inconvenience suffered in consequence of being obliged to walk home. The plaintiff was not entitled however, to the 28 pounds sterling awarded for the illness suffered by the wife and its consequences as this did not result naturally from the breach and was therefore too remote.

The speech of Blackburn, J (Mellor and Archibald JJ concurring) at pp. 121 to 122 conveys the ratio of the court:

> Then comes the further question, whether the damages for the illness of the wife are recoverable; I think they are not, because they are too remote. On the principle of what is too remote, it is clear enough that a person is to recover in the case of a breach of contract the damages directly proceeding from that breach of contract and not too remotely. Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation; and therefore I agree with what my Lord has said to-day, that you make it a little more definite by saying such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it. For my own part. I do not feel that I can go further than that. It is a vague rule, and as Bramwell, B, said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the court, though you cannot draw the precise line, you can say on which side of the line the case is; I do not see the analogy between this case and the case that was suggested, where a railway company made a contract to carry a passenger, and from want of reasonable care they dashed that passenger down and broke his leg, and he recovers damages from them. For such a breach as that, the most direct, immediate consequence is, that he would be lamed. That is the direct consequence of such a breach of contract; but though here the contract is the same, a contract to carry the passenger, the nature of the breach is quite different; the nature of the breach is simply that they did not carry the plaintiff to his destination, but left him at Esher. To illustrate this, – suppose you expand the declaration and say: You, the defendants, contracted to carry me safely to Hampton Court, you negligently upset the carriage and dashed me on the ground, whereby I became ill and sick. That is a clear and immediate consequence. The other case is: You contracted to carry me to Hampton Court, you went to Esher, and put me down there, by which I was obliged to get other means of conveyance, for the purpose of getting to Hampton Court; and because I could find no fly or other conveyance, I was obliged, as the only means of getting to Hampton, to walk there, and because

> it was a cold and wet night, I caught cold and I became ill. When it is put in that way, there are many causes or stages which there are not in the other.
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> With regard to the two instances my Lord put, – one, of the passenger, when walking home in the dark, stumbling and breaking his leg, the other, of his hiring a carriage, and the carriage breaking down, – I must say I think they are on the remote side of the line, and further from it than the present case.

Assuming that the damages had been assessed on the basis that the defendant had committed a breach of contract (an issue which I shall revert to shortly), the plaintiffs would have failed to recover any loss under the principle of remoteness.

It is true that assessment of damages has always been the province of the registrar who is to all intents, the judge for the purpose whose award is seldom disturbed by the court. As Greer LJ said in *Flint v. Lovell* [1935] 1 KB 345, at 360:

> the court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

But the registrar in this case had clearly acted on the wrong principle. I am therefore constrained to disagree with the submission of counsel for the plaintiffs that the registrar's decision should not be disturbed.

Assessment Of Damage Based On Tort

But the defendant's liability clearly arose from a tort rather than from a breach of contract. The judgment, it is clear, was entered on the ground that the defendant did not have the right to have the plaintiffs' baggage re-weighed at the final destination and to impose on them the further excess baggage charges. The following paragraph in the judgment confirms the point:

> Oleh itu, Mahkamah ini telah memutuskan bahawa defendan tidak berhak untuk meminta plaintif menimbang semula bagasinya di destinasi muktamad dan menuntut pembayaran caj bagasi tambahan. Defendan hanya berhak membuat demikian di poin asal, iaitu di Lapangan Terbang Madras. Maka, dengan ini. saya telah membenarkan permohonan plaintif dan mengarahkan bahawa suatu tarikh awal ditetapkan oleh Penolong Kanan Pendaftar bagi menaksirkan gantirugi yang dialami oleh plaintif.

The infringement of the plaintiffs' right not to be forced into paying the excess baggage would have under the circumstances, given rise to an action in tort. As *Clerk & Lindsell on Tort*, 18th edn, explained at para. 1-22:

> **Violation of interest.** The commission of a tort requires proof that an interest recognised by the law of torts has been violated by conduct prohibited by the law of torts. The law slowly evolved from the writs of trespass and the action on the case and no single thread of principle governed the development of new torts. The very language of torts, the Norman-French word "tort" itself and its genesis in trespass suggests an emphasis on "wrongs" and wrongdoing. Yet for conduct to be treated as a "wrong" presupposes the existence of a "right". The defendant's conduct is wrong because it violates a right enjoyed by the plaintiff. Identifying the "rights" and interests protected by the law of torts is however no easy task. By no means every interest of humankind falls within the protection of the law of torts.

The tort committed upon the plaintiffs in this instance comes within that general category of infringement of their legal right causing them to suffer the non-pecuniary loss they are now claiming. Rightly, therefore the assessment of damages should have been based on liability in tort and not breach of contract. There could not have been any breach of contract on the part of the defendant as its obligation under the contract had been duly performed upon conveying the plaintiffs to Subang Airport.

A tort arising from the infringement of a legal right (as in defamation) is actionable *per se*, that is to say, damage is presumed merely upon proof of the infringement of such a right. There is no need for the plaintiff to prove (as in negligence) a causal connection between the wrong done and the damage suffered in consequence, such that the question of remoteness is quite irrelevant. The principle had its origin in the *Ashby v. White* [1703] 2 Lord Ryam 938, but was restated with approval by Lord Wright in the Court of Appeal case of *Nicholls v. Elley Beet, etc. Ltd* [1936] Ch. 343 at 380 where the following general proposition was made:

> ... the ability to maintain such an action (for infringement of rights of fishing, in that case) depends on a much wider principle, that is the principle that where you have an interference with a legal right the law presumes damage.

The infringement of the plaintiffs' rights having been established, it would now only be necessary to measure the damages to be awarded.

Measure Of Damages

In attempting to measure the damages that may be awarded to the plaintiffs two basic principles of assessment must first be understood.

The first is with respect to its function. As Lord Blackburn said in *Livingstone v. Rawyard Coal Co.* [1880] 5 App. Cas 25 at 39, damages is:

> that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

The second is a corollary of the first – that in awarding damages, the plaintiff should not be allowed to profit by it. The principle is enunciated in the Federal Court case of *Tan Sri Khoo Teck Puat v. Plenitute Holdings Sdn Bhd* [1994] 3 MLJ 777 wherein Edgar Joseph Jr FJ speaking for the panel said at p. 788:

> It goes without saying that the effect of allowing the plaintiff's claim is to put him in a better position than he would have been if there had been no breach, then this would be contrary to the principles enunciated above.

In proposing this principle the Federal Court relied on the English Court of Appeal case of *C & P Haulage v. Middleron* [1983] 3 All ER 94 wherein Ackner LJ said at 98-100:

> It is not the function of the court where there is a breach of contract knowingly, as this would be the case, to put a plaintiff in a better financial position than if the contract had been properly performed.

If the two principles are properly appreciated, it will be at once discernible that the registrar had awarded too much for too little. The award in multiples of thousands is in my view, outrageously excessive and disproportionate. The amount awarded to each plaintiff exceeded many times the cost of air passage that he may have paid.

There is yet another principle one must be acquainted with – that a claimant must prove his loss. As Lord Goddard said in *Bonham-Carter v. Hyde Park Hotel Ltd* 64 TLR 177 at 178 and adopted applied in *John v. Dharmaratnam* [1962] MLJ 187 and more recently in *Tan Sri Khoo Teck Puat (supra)*:

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it.

To 'prove', in the context of the speech of Lord Goddard means to provide some form of evidence sufficient to convince the decider to the point that he believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act on the supposition that it exists. (See s. 2 definition of 'prove' in the Evidence Act 1950.)

The plaintiffs provided none of the evidence that they claimed to have suffered beyond the mere assertion of having suffered them.

The testimonies of the two witnesses (who claimed to be the supporters of the first plaintiff awaiting his arrival at the airport) to the effect that their esteem of him had been lowered after the incident, demonstrate in my view, the extent to which the first plaintiff was prepared to go to embellish his claim. Their testimonies were clearly unbelievable and ought not to have been accepted as proof that the first plaintiff had suffered loss of reputation. No right thinking person would have harboured such a negative sentiment unless the plaintiff was being detained for a criminal act. Being forced to wait at the airport for a while longer than necessary for the purpose of attending to problems relating the clearance of one's baggage was nothing extraordinary.

The same observation applies with respect to the second plaintiff. The medical practitioner who gave evidence did no more than repeating her complaints. No formal examination or test was conducted on her to verify her complaints. Above all, her complaint of suffering flight phobia by reason that the plane was carrying excess weight was totally unfounded. There was no evidence that the safety of the flight was compromised by carrying excess weight.

As for the third plaintiff, her claim that she suffered so much from the incident that she was unable to continue with her part-time business of organizing tours and had to seek the blessing of a priest in India is absolutely unrealistic. A reasonable man would not be able to comprehend how the effect of being detained at the airport for two hours and being made to pay additional excess baggage can cause such sufferings in her person as to affect her capacity to continue with her part-time tour business.

A Case For Nominal Damage?

The plaintiffs had proved that their legal right had been infringed. If the submission of counsel for the defendant that the plaintiffs have failed to prove that they suffered any loss is correct, this would mean that only nominal damages may be awarded to the plaintiffs.

As Lord Halsbury LC in *The Mediana* [1900] AC 113 said at 116:

> 'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

Lord Halsbury spoke of 'nominal damages' in the narrow sense. Modern jurisprudence however, recognises at least two sets of circumstances under which such damages may be appropriately awarded. Wee Chong Jin CJ sets them out accurately in the Singapore Court of Appeal case of *Fraser & Neave Lid v. Yeo Hiap Seng Ltd* [1989] 1 CLJ 275 (at p. 282); [1989] 2 CLJ (Rep) 809 (at p 817):

> (1) Where there is *injuria sine damno*. An injuria or wrong entitles the plaintiff to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such judgment will be for nominal damages only ...
>
> (2) Where damage is shown but its amount is not sufficiently proved. The problem is simply one of proof, one not of absence of loss but of absence of evidence of the amount of loss. Our present case is clearly one of absence of loss.

I would not however, go so far as to say that the plaintiffs had not suffered any loss for the period that they were kept at the airport, or that they were unable to prove that they had so suffered. An award of nominal damages under the circumstances is inappropriate. They did, as I said, suffer some discomfort and inconvenience, *albeit* for a short duration of only two hours. As trivial and small as they may appear, nevertheless the plaintiffs are entitled to have them assessed. As Lord Evershed said in *Kitchen v. Royal Air Forces Association* [1958] 2 All ER 241 at 250-251:

> In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the plaintiff has lost by that negligence. The question is: Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can.

Had their egress from the airport been without let or hindrance, they would have arrived home some two hours earlier – in time to start a new day with a clear mind and purpose. In all fairness therefore, they should be compensated for the discomfort and inconvenience they had undergone. This should translate in monetary form, in my estimate, to the cost of providing each of them with a day's rest, say the sum of RM300.

There shall be an order that the defendant pay to each plaintiff the sum of RM300 as damages.